93-277

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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

HARRY S. THERIOT AND RAUL TREVINO,
Petitioners

vs.

GREAT WESTERN COCA COLA BOTTLING CO.
d/b/a COCA COLA BOTTLING COMPANY OF
HOUSTON,
Respondent

# PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

ROBERT T. WALLACE
P.O. Box 301003
Houston, Texas
77230-1003
(713) 789-7398
Counsel for
Petitioners

LIONEL MILLS
P.O. BOX 301003
Houston, Texas
77230-1003
(713) 789-7398
Counsel of
Record

78 pp

## QUESTIONS PRESENTED

1. Does a suit subsequently filed against the Defendant in its actual name relate back to the original complaint filed against the Defendant in its assumed name, where the defendant knew that it was being sued?

2. Does the representation for the Equal Employment Commission to the Plaintiffs that the time for filing an age discrimination suit had been extended to six years by the Age Discrimination Claims Assistance Act of 1988 as amended in 1990, constitute a bar to the Petitioners furthering their Civil Rights cause of action when they relied upon such representation?

## LIST OF PARTIES

The parties to the proceedings below were Robert T. Wallace, Christopher H. Steger, and Stephen P. Carrigan.

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**HARRY S. THERIOT** and **RAUL TREVINO**, petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the order filed on March 8, 1993, in Theriot and Trevino v. Great Western Coca Cola Bottling Co. d/b/a Coca Cola Bottling Company of Houston, No. 92-2393.

## OPINIONS BELOW

The denial of the Respondent's motion for sanctions on March 17, 1993, has not been reported and is reprinted in the Appendix, App. at 1.

The denial of the Petitioners' motion for rehearing on March 8, 1993 and the opinion of the Court of Appeals for the Fifth Circuit entered on February 5, 1993 have not been reported and are reprinted in the Appendix, App. at 2 and App. at 3.

The memorandum and order decision of the United States District Court for the

Southern District of Texas, Houston Division (DeAnda, District Judge) has not been reported. It is reprinted in the Appendix, App. 5.

The final order of dismissal and memorandum opinion of the United States District Court for the Southern District of Texas, Houston Division, have not been reported and are reprinted in the Appendix. App. at 9 and App. at 10.

**JURISDICTION**

Invoking jurisdiction under 28 U.S.C. § 1343 (App. at 34), 28 U.S.C. § 2201 (App. at 36) and 29 U.S.C. § 621, the Petitioners brought this suit in the United States District Court for the Southern District of Texas, Houston Division. On April 9, 1992, the Southern District Court granted the Respondent's motion to dismiss and entered its final order of dismissal and memorandum

opinion on April 10, 1992. See App. at 9 and App. at 10. On May 27, 1992 the Southern District Court entered its memorandum and order denying the Petitioners' motion to reinstate. See App. at 5.

On Petitioners' appeal, the Fifth Circuit on February 5, 1993 entered a judgment and an opinion affirming the Southern District Court's orders of dismissal directing that the Petitioners' causes of action be dismissed because they were barred by the statute of limitations pursuant to 29 U.S.C. §§ 626(e)(1), 255. See App. at 3. On March 8, 1993, the Fifth Circuit denied the Petitioners' motion for rehearing. See App. at 2, infra. On March 17, 1993, the Fifth Circuit denied the Respondent's motion for sanctions. See App. at 1.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254 (1). App. at 33.

## STATUTE INVOLVED

28 U.S.C. § 1291. Final decisions of district courts.

The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court of the Canal Zone, the United States District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the

jurisdiction described in §§ 1292 (c) and 1295 of this title.

**STATEMENT OF THE CASE**

On the 14th day of September, 1987, the Respondent, Great Western Coca-Cola Bottling Company d.b.a. Coca-Cola Bottling Company of Houston discharged the Petitioners, Harry S. Theriot and Raul Trevino, Maintenance Mechanics, who had been employed by the Respondent for 7 years and nine months and 8 years and 10 months, respectively.

On February 18, 1992, the Petitioners instituted this suit in equity, sounding in the protection of and the redress of the deprivation of their rights, pursuant to the Age Discrimination in Employment Act of 1967, § 2, 29 U.S.C. § 621, prohibiting job discrimination against employees between the ages of 40 and 78, on the basis of age, concerning hiring, discharging, training,

and classifying. The complaint alleged that Respondent had intentionally discharged the Petitioners because of their age, and replaced them with younger employees in violation of their rights under the Age Discrimination in Employment Act as amended, 29 U.S.C. § 621. That the Petitioners had in no way, violated any company policy, nor had they violated their duty of employment. That the Petitioners were in good health and were prevented from at least reaching their ten (10) years of vested retirement. That the Petitioners were well qualified for the positions they held, and were performing their duties in accordance with the policies of the Respondent, and were victims of lay-offs solely because of their age, and not because of business necessity, and were replaced with employees less qualified.

On March 17, 1992, the Respondent filed

its Motion to Dismiss the Petitioners' Complaint for failure to state a claim upon which relief could be granted, as well as its Brief in Support of Motion to Dismiss.

On April 8, 1992, the Petitioners filed the Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss along with their Exhibits "A" through "K", and proposed order.

Thereafter, on the 9th day of April, 1992, the Honorable James DeAnda, the presiding Chief Judge of the United States District Court issued his Memorandum Opinion dismissing the Petitioners' claims of age discrimination (App. at 10) and entered his Final Order of Dismissal on the 10th day of April, 1992. App. at 9.

On April 17, 1992, the Petitioners filed their Motion to Reinstate and the Plaintiffs' Exhibit "A" in Support of Plaintiffs' Motion to Reinstate. The

Respondent filed the Defendant's Response to Plaintiffs' Motion to Reinstate on May 7, 1992, and its Memorandum in Support of Defendant's Opposition to Plaintiffs' Motion to Reinstate.

On the 8th day of May, 1992, the Petitioners filed their first Notice of Appeal to the Fifth Circuit Court of Appeals from the Final Order of Dismissal entered by the District Court on April 10, 1992.

On the 27th day of May, 1992, the District Court entered its Memorandum and Order and denied the Plaintiffs' Motion to Reinstate. App. at 5.

The Petitioners allege that the District Court totally ignored the fact that the Respondent had acknowledged that it had been served with Petitioners' Original Complaint by service to the manager of its facility in Houston, Texas when it filed

Defendant's Motion to Dismiss and Motion for Partial Judgment on the Pleadings. That the lower Court further failed to recognize the fact that the Respondent, Coca-Cola Enterprises, Inc., was actually timely served within 120 days of the filing of the Petitioners' second Complaint pursuant to a summons that was issued on December 23, 1991 and a letter dated December 27, 1991 advising Josh Curnell, the process server for the Petitioners that C.T. Corporation was not the registered agent for Coca Cola Enterprises, Inc., and the lower Court further failed to consider or recognize the request of the Petitioners to relate their civil action complaint that they filed on February 18, 1992 back to the filing of their Original Complaint.

The Petitioners assert that the Respondent complicated the issue of notice by continuing to do business as Coca Cola

Bottling Company of Houston approximately fifteen years after registering its name as Great Western Coca Cola Bottling Company and failed to state the same when suit was filed against it.

The Petitioners subsequently discovered that Great Western Coca-Cola Bottling Company was apparently a subsidiary of J.T.L. Enterprises (J.T.L. Corporation or Lupton Group) before it was acquired by Coca-Cola Company and reorganized as a bottling operation when The Coca-Cola Company created Coca-Cola Enterprises, Inc.

The Petitioners' relation back theory is that since Coca-Cola Enterprises is now the parent corporation of Great Western Coca-Cola Company and its Board of Directors are directors of the subsidiary, the Coca-Cola Company in Houston, Texas is directly controlled by Coca-Cola Enterprises. That Coca-Cola Enterprises is in fact the true

owner of said subsidiary, which means that the Houston Coca Cola Company is an alter ego of Coca-Cola Enterprises. Thus, the corporate vail or umbrella had to be pierced in order to reach the real owner.

The Petitioners theorize that their Complaints should be considered as amendments and should relate back to their first Original Complaint. Rule 15(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that but for the

> mistake concerning the identity of the proper party, the action would have been brought against him." (See 1991 Amendment, App. at 40).

In the instant case, the Respondent, Great Western Coca Cola Bottling Company D.B.A. Coca-Cola Bottling Company of Houston knew the suit was being brought against it when suit was originally filed against Houston Coca-Cola Bottling Company of Houston, Texas. The Petitioners contend they had left the registered agent for service in their original complaint blank and had served the officers of the Respondent since the Respondent had no registered agent under its assumed name. However, when the Defendant filed an answer alleging that proper service had not been made on its registered agent, there is no question but that the Respondent knew that it was being sued.

Although the Respondent had filed Defendant's Motion to Dismiss Complaint and Motion for Partial Judgment on the Pleadings (Record at 0040, App. at 12) and its Brief in Support of Defendant's Motion to Dismiss and Motion for Partial Judgment on the Pleadings (Record Excerpts at 50 and App. at 14) and had moved for dismissal on grounds that its registered agent was not served within the limitation of Rule 4(j) of the Federal Rules of Civil Procedure, the Honorable Lynn N. Hughes, United States District Judge apparently dismissed the civil action of the Appellants[1] without

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[1]Petitioners were denied their rights to due process when the District Judge, Lynn N. Hughes, failed to accord them an opportunity to respond to the Defendant's Motion to Dismiss and Motion for Partial Judgment on the Pleadings. It is evident from the Defendant's Brief in Support of Defendant's Motion to Dismiss and Motion for Partial Judgment on the Pleadings that Defendant, Houston Coca-Cola Bottling Company, was timely served with Plaintiffs' Original Complaint at the bottling plant at

viewing the Appellee's pleadings nor recognizing the fact that the Petitioners had served the Houston Coca-Cola Bottling Company at 2800 Bissonnet, Houston, Texas which, was the proper agent of the Respondent at that time since the Secretary of State of Texas did not have a listing of a registered agent for Houston Coca-Cola Bottling Company when the Petitioners filed their original complaint on September 14, 1989. (Record at 0044).

The Petitioners contended on appeal to the Fifth Circuit that the lower Court limited the Petitioners claims of Age

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2800 Bissonnet in Houston, Texas where the Petitioners had been discharged from their employment with Defendant as maintenance mechanics and replaced with younger employees on September 14, 1987. Thus, the Respondent was timely served within 120 days as required by Rule 4(j) of the Federal Rules of Civil Procedure by the Respondent's own admission. Therefore, Judge Hughes failed to accord due process to the Petitioners because he dismissed their Original Complaint without a hearing.

Discrimination to § 255 of 29 U.S.C.A. of the Fair Labor Standards Act of 1938, as amended since the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C.A. § 621 did not provide an independent statute of limitation.

That since the subsidiary Respondent, Great Western Coca-Cola Bottling Company was owned and controlled by the parent corporation, Coca-Cola Enterprises, Inc., and was known to distribute their beverage products throughout the United States and the rest of the world as well as contracting to provide the Departments of the Army, Air Force, Navy, and Marines with large quantities of their beverage products for consumption to military and federal agencies, and are further known to transport their beverage products in interstate commerce, the Petitioners, Harry S. Theriot and Raul Trevino, Maintenance

Mechanics, who has been employed by the Respondent should have been treated no differently than federal employees since the Respondent's contractual relationships with the United States Government had brought the Respondent under certain federal guidelines in the employment of its employees based upon age, sex, handicapped conditions, etc., as well as requiring the Respondent to provide protection of older workers against discrimination in the workplace.

That Petitioners were led to believe that their age discrimination claims were subject to the six year statute of limitations that was allowed for federal employees pursuant to Lubniewski v. Lehman, 891 F.2d 216 (CA9, 1989) and the catch all statute of limitations for non-tort civil claims against the United States as provided under 28 U.S.C. § 2401(a) (1982)

because of the Respondent's contractual relationship with the United States Government.

That in reliance upon the representation of the Equal Employment Opportunity Commission, the Petitioners further forewent their action in this cause and proceeded with locating the Respondent and its registered agent because the E.E.O.C. repeatedly advised them that they were no longer subject to the two and three year statute of limitation after their suit was dismissed in 1990. Since the Petitioners had originally filed suit on the 14th day of September, 1989, their time to refile under the six year non-tort statute would have run until September 14, 1993.

On March 8, 1993, a three-judge panel denied the Petitioners' Petition for rehearing. App. at 2.

The final order sent to the Petitioners

from the Court of Appeals for the Fifth Circuit was an order of a three-judge panel that denied the Respondent's Motion for sanctions on March 17, 1993. App. at 1.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE FIFTH CIRCUIT'S DECISION OF AFFIRMANCE WITH THE DISTRICT COURT AND ITS DENIAL OF THE PETITIONERS' MOTION FOR REHEARING CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE THEORY OF A SUBSEQUENTLY FILED SUIT RELATING BACK TO THE ORIGINAL COMPLAINT.

Petitioners' cause of action arose on the 14th day of September, 1987. The Petitioners timely filed their suit on September 14, 1989, which was within the three year limitation period, and timely served the Defendant, Houston Coca-Cola Bottling Company within the 120 day limitation period under Rule 4(j) of Federal Rules of Civil Procedure. Said suit was dismissed under Rule 4(j) for

failure to prosecute.

Since the Respondent had changed its name from Houston Coca Cola Bottling Co. to Great Western Coca Cola Bottling Company, the Petitioners were unable to locate its registered agent through the Secretary of State.

On August 29, 1991, the Petitioners filed suit against the parent company, Coca Cola Enterprises and served a copy of their summons and complaint upon C. T. Corporation. Said corporation alleged that it was not the registered agent for Coca Cola Enterprises. Said suit was dismissed under Rule 4(j) for failure to prosecute.

During all times material to this cause, the Secretary of State was unable to locate a listing for Respondent, or the name of the registered agent for the Respondent, Coca Cola Bottling Company. However, the secretary gave the Petitioners the listings

of Austin Coca Cola Bottling Company and San Antonio Coca Cola Bottling Company, neither of which were the Respondent.

Subsequently, on January 8, 1992, the Secretary of State after an extensive search, notified Petitioners that Respondent's name had been changed to Great Western Coca Cola Bottling Company. At all times material to this cause, the Respondent was doing business as Houston Coca Cola Bottling Company, which was the reason why the Petitioners were unable to locate the Respondent.

Subsequently, on February 18, 1992, the Petitioners filed suit against Great Western Coca Cola Bottling Company and timely served its agent with a copy of the complaint and summons. The Petitioners' suit was dismissed as being time barred by the statute of limitations.

It is clear that Petitioners' suit,

filed February 18, 1992 relates back to their original complaint. The relation back of amendments is governed by Rule 15(c) of the Federal Rules of Civil Procedure, and the Supreme Court recently has set forth four factors for determining when an amended pleading relates back. Schiavone v. Times Magazine Company, 106 S.Ct. 2385:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it, and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

In Dacus v. United States Postal Service, No. 87-6067 (5th Circuit, 1987), the Court ruled that: "Dacus could have satisfied the notice requirement by contacting within the limitations period "the United States Attorney, or his designee, or the Attorney General of the United States, or any agency or officer who would have been a proper defendant if named . . ." Fed. R. Civ. P. 15(c). Here, no government entity was served until February 13, 1987. Postmaster General Tisch could not have known within the limitations period that a suit would have been brought against him but for Dacus' mistake in naming the proper defendant. The amendment thus cannot relate back. See Bell v. Veterans Administration Hospital, 826 F.2d 357, 359 (5th Cir. 1987); Gonzalez v.

Secretary of Air Force, 824 F.2d 392, 395-96 (5th Cir. 1987)."

In the case at bar, unlike the "Dacus" case, the Petitioners filed suit against Houston Coca Cola Bottling Company and timely served it with summons and complaint. The Respondent filed an answer stating that its registered agent was not properly served, when in fact C.T. Corporation was not the registered agent of Houston Coca Cola Bottling Company, but was in fact the registered agent of Great Western Bottling Coca-Cola Bottling Company.

When the Petitioners finally discovered that the name registered for Respondent was Great Western Coca Cola Bottling Company, they filed suit against Great Western. When Petitioners filed their original suit against Houston Coca Cola Bottling Company, Great Western knew that it was being served

because its assumed name was Houston Coca Cola Bottling Company. Therefore, the Petitioners' suit against Great Western Coca Cola Bottling Company relates back to their original suit against Houston Coca Cola Bottling Company.

In Dacus, supra, the Court said that Dacus may serve the complaint any time within the 120 days, for purpose of relating back, and the defendant must receive notice within the period set by the Statute of limitation.

II. THE FIFTH CIRCUIT'S DECISION OF AFFIRMANCE WITH THE DISTRICT COURT AND ITS DENIAL OF THE PETITIONERS' MOTION FOR REHEARING CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS WHERE THE PETITIONERS HAVE RELIED UPON THE REPRESENTATION OF A FEDERAL AGENCY AND HAVE BEEN PREVENTED FROM ASSERTING THEIR RIGHTS.

The Petitioners were led to believe that their age discrimination claims were subject to the six year statute of limitations that was allowed for federal

employees pursuant to Lubniewski v. Lehman, 891 F.2d 216 (CA9, 1989) and the catch all statute of limitations for non-tort civil claims against the United States Government as provided under 28 U.S.C. § 2401(a) (1982) because of the Respondent's contractual relationship with the United States Government.

In reliance upon the representation of the Equal Employment Opportunity Commission, the Petitioners further forewent their action in this cause and proceeded with locating the Respondent and its registered agent because the E.E.O.C. repeatedly advised them that they were no longer subject to the two and three year statute of limitation after their suit was dismissed in 1990. Since the Petitioners had originally filed suit on the 14th day of September, 1989, their time to refile under the six year non-tort statute would

have run until September 14, 1993.

In Johnson vs. United States Postal Service, 861 F.2d 1475, at 1480, quoting Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984) the Court held that limitation will be tolled:

> "Only where the circumstances of the case rise to a level of active deception sufficient to invoke the powers of equity. For instance, equitable tolling may be appropriate where a plaintiff has been lulled into inaction . . . by federal agencies or the Court, or has in some extraordinary way been prevented from asserting his or her rights, we will permit the tolling period."

The Petitioners rightfully and reasonably believed that the E.E.O.C. was knowledgeable of the procedures of filing civil right suits in the Federal Courts, and therefore the Petitioners are entitled to the tolling of the limitation period.

It was not a mistake nor the lack of diligence on Petitioners' part, but reliance upon the representation of a

federal agency of the government that advises civil right complainants of their rights to sue, and the time to file suit.

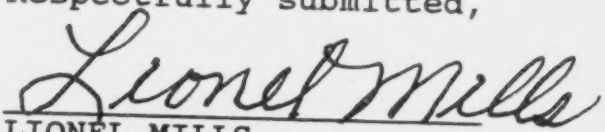
This was clearly demonstrated when Congress extended the time for hundreds of age discrimination employees to file suit upon a mistake or oversight of the Equal Employment Opportunity Commission.

The Petitioners are honest, hard working Maintenance Mechanics who have spent long hours, working at the Respondent's bottling plant to improve the quality of production and enhance safe working conditions in their work place. If fairness, equity, and justice are to survive in our country, these working men must be allowed their opportunity to be heard in our courts.

In summary, this Petition should be granted. If the Petitioners are correct in urging that the District Court decision affirmed by the Court of Appeals for the

Fifth Circuit is in conflict with the established decisions of this Court, the matter herein should be remanded to the District Court for appropriate disposition because due process must be accorded to every citizen to protect the integrity of the judiciary and to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitation defense.

Respectfully submitted,



LIONEL MILLS
P.O. Box 301003
Houston, Texas 77230-1003
(713) 789-7398
Counsel of Record

ROBERT T. WALLACE
P.O. Box 301003
Houston, Texas 77230-1003
(713) 789-7398
Counsel for Petitioners

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-2393

---

HARRY S. THERIOT and
RAUL TREVINO,

Plaintiffs-Appellants,

versus

GREAT WESTERN COCA-COLA BOTTLING
d/b/a Coca Cola Bottling Company
of Houston,

Defendant-Appellee.

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Appeals from the United States District
Court for the Southern
District of Texas

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Before GARWOOD, JONES and EMILIO M. GARZA,
Circuit Judges,
BY THE COURT:

IT IS ORDER that appellee's motion for sanctions is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 92-2393

---

HARRY S. THERIOT and
RAUL TREVINO,

Plaintiffs-Appellants

versus

GREAT WESTERN COCA-COLA BOTTLING
d/b/a Coca Cola Bottling Company of
Houston,

Defendant-Appellee.

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Appeal from the United States District
Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(March 8, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/
Emilio M. Garza
United States Circuit Judge

# # # # # # #

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

---

No. 92-2393
(Summary Calendar)

---

HARRY S. THERIOT and
RAUL TREVINO,

Plaintiffs-Appellants

versus

GREAT WESTERN COCA-COLA BOTTLING
d/b/a Coca Cola Bottling Company of
Houston,

Defendant-Appellee.

---

Appeals from the United States District
for the Southern District of Texas
(CA H 92 488)

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Before GARWOOD, JONES, and EMILIO M. GARZA,
Circuit Judges.

PER CURIAM:[b]

We have reviewed the record in this case and agree with the district court that plaintiffs' causes of action,[1] arising from their discharge on September 14, 1987, are barred by the statute of limitations. See 29 U.S.C. §§ 626(e)(1), 255.

Accordingly, we AFFIRM.



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[b]Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession. Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]Plaintiffs filed the underlying complaint on February 18, 1992. See Record on Appeal at tab 1.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| HARRY S. THERIOT and RAUL TREVINO, Plaintiffs, | § | |
| vs. | § | CIVIL ACTION NO. H-92-488 |
| GREAT WESTERN COCA-COLA BOTTLING CO. d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON Defendant. | § | |

MEMORANDUM AND ORDER

By order signed April 9, 1992, the above-referenced matter was dismissed with prejudice as time-barred. The case is now before the Court on plaintiffs' motion to reinstate, in which plaintiffs assert that the action was not timely filed because they were unable to locate defendant's registered agent. The Court, having carefully considered the motion to reinstate and the opposition thereto, finds that plaintiffs' motion to reinstate is

without merit and should be denied.

It is undisputed that plaintiffs' employment with defendant was terminated on September 14, 1987. Plaintiffs filed a complaint, civil action H-89-3171, on September 14, 1989, which was assigned by Judge Lynn Hughes. That case was dismissed pursuant to Rule 4(j) on January 18, 1990 for failure to serve the summons and complaint within 120 days of the filing of the complaint. Plaintiffs did not assert in that case an inability to locate defendant's registered agent as the basis for a motion to reinstate. Instead, plaintiffs waited until August 29, 1991 and filed a second lawsuit, civil action H-91-2453, which was assigned to Judge David Hittner. That case was dismissed pursuant to Rule 4(j) on January 2, 1992. Again, plaintiffs did not move to reinstate. The case at bar, plaintiffs' third lawsuit

regarding the termination of their employment, was filed February 18, 1992, approximately six weeks after the 4(j) dismissal in Judge Hittner's court. On motion of defendant, the case was dismissed with prejudice as outside the two-year statute of limitations for actions under the Age Discrimination in Employment Act. Plaintiffs moved to reinstate and, for the first time since their discharge in September 1987, asserted that they had been unable to locate a registered agent for defendant.

Plaintiffs' allegation that they were unable to effect service on defendant because they could not identify a registered agent lacks credulity. Initially, the Court notes that the assertion was not raised in the two prior cases to explain the failure to effect service and to avoid dismissal or seek

reinstatement. Additionally, plaintiffs have submitted no documentation indicating that they attempted unsuccessfully to locate a registered agent. Plaintiffs' attempt to excuse their failure to file within the proper limitations period also ignores the alternative methods of service provided by Rule 4 of the Federal Rules of Civil Procedure, specifically service upon an officer or a managing or general agent. Finally, the Court also notes that plaintiffs assert in their complaint that the action is timely filed "within the five year limitation period provided under 29 U.S.C. § 621."

Based upon the foregoing, the Court finds that the motion to reinstate is without merit. Accordingly, it is hereby

O R D E R E D

that plaintiffs' motion to reinstate is DENIED.

SIGNED this 26th day of May, 1992.

/s/
James DeAnda
Chief Judge
United States
District Court

# # # # # # #

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| HARRY S. THERIOT and RAUL TREVINO Plaintiffs, | § | |
| vs. | § | CIVIL ACTION NO. H-92-488 |
| GREAT WESTERN COCA-COLA BOTTLING CO. d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON Defendant. | § | |

FINAL ORDER OF DISMISSAL

In accordance with the memorandum opinion signed this day, it is hereby

O R D E R E D

that defendant's motion to dismiss is GRANTED and the above referenced case DISMISSED WITH PREJUDICE.

Taxable costs are assessed against plaintiffs. THIS IS A FINAL ORDER.

SIGNED this 9th day of April, 1992.

/s/
J. DeAnda
Chief Judge
United States
District Court

# # # # # # #

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| HARRY S. THERIOT and RAUL TREVINO Plaintiffs, | § | |
| vs. | § | CIVIL ACTION NO. H-92-488 |
| GREAT WESTERN COCA-COLA BOTTLING CO. d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON Defendant. | § | |

MEMORANDUM OPINION

This case is before the Court on defendant's motion to dismiss, in which defendant asserts that plaintiffs' age discrimination claims are barred by the

statute of limitations. Claims filed under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., must be filed within two years, unless the alleged violation is a willful one, in which case the complaint must be filed within three years. 29 U.S.C. § 626(e)(1), 29 U.S.C. § 255. In the case at bar, plaintiffs allege that they were discharged from their employment with defendant on September 14, 1987. Plaintiffs did not file their complaint until February 18, 1992, approximately four years and five months after their discharge. As a result, their claims of age discrimination are time-barred and must be dismissed. An appropriate final order of dismissal consistent with this memorandum opinion shall be issued this day.

SIGNED this 9th day of April, 1992.

/s/
J. DeAnda
Chief Judge
United States District
Court

# # # # # # #

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| HARRY S. THERIOT and RAUL TREVINO<br>Plaintiffs, | § | |
| vs. | § | CIVIL ACTION NO. |
| | § | H-89-3171 |
| HOUSTON COCA-COLA BOTTLING COMPANY, INC.,<br>Defendant. | § | |

DEFENDANT'S MOTION TO DISMISS COMPLAINT
AND MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS

Defendant Houston Coca-Cola Bottling Company, Inc. ("HCCBC"), pursuant to Federal Rules of Civil Procedure 12(b)(5) and 4(j), hereby moves this Court to dismiss Plaintiffs' Complaint against HCCBC on the grounds, more fully explained in the brief filed herewith, that there has been

an insufficiency of service of process and an untimeliness of service on behalf of Plaintiffs.

Alternately, HCCBC, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, moves this Court for a partial judgment on the pleadings with respect to Paragraph 5 of Plaintiffs' prayer for relief, requesting an award of pecuniary damages, on the ground, set forth in the attached brief, that the pecuniary damages requested are not allowable under the Age Discrimination in Employment Act, 29 U.S.C. §§ 612, et. seq.

WHEREFORE, HCCBC respectfully requests that this Motion and the grounds therefore be inquired into and that an order granting the Motion be entered.

EXHIBIT
"C"

This 15th day of January, 1990.

JENKENS & GILCHRIST

By:/s/
Thomas Hunt
1100 Louisiana
Suite 900
Houston, Texas 77002

Attorneys for Defendant Houston Coca-Cola Bottling Company, Inc.

0039

OF COUNSEL:

Phillip A. Bradley
Cathy L. Peterson

LONG, ALDRIDGE & NORMAN
Two Concourse Parkway
Suite 750
Atlanta, GA 30328-5347
(404) 527-8300

# # # # # # #

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| HARRY S. THERIOT and RAUL TREVINO Plaintiffs, | § | |
| vs. | § | CIVIL ACTION FILE |
| HOUSTON COCA-COLA | § | NO. H-89-3171 |

BOTTLING COMPANY, §
INC., §
Defendant. §

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO *DISMISS AND MOTION* FOR PARTIAL JUDGMENT ON THE PLEADINGS

## I. INTRODUCTION

Harry S. Theriot and Raul Trevino ("Plaintiffs") were discharged by Houston Coca-Cola Bottling Company, Inc. ("HCCBC") in a reduction in work force on September 14, 1987. Plaintiffs filed charges with the Equal Opportunity Employment Commission ("EEOC"), pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 612 et. seq. In its response to the EEOC, HCCBC denied that its actions were, in any way, motivated by Plaintiffs' ages; rather, HCCBC documented its decision to terminate Plaintiffs based upon a necessary reduction in force, and corresponding poor work performance by Plaintiffs.

On December 5, 1988, the Houston branch of the EEOC issued "no cause" determination with respect to both Mr. Theriot's and Mr. Trevino's charges against HCCBC. See Exhibit A. Subsequently, on May 17, 1989 and June 9, 1989 respectively, the Washington division of the EEOC affirmed the regional office's "no cause" determinations regarding Mr. Trevino's and Mr. Theriot's charges. See Exhibit B.

HCCBC recently became aware that on September 14, 1989, the last date for the running of the statute of limitations in this action, Plaintiffs filed an ADEA complaint with this Court. HCCBC is also aware that Plaintiffs apparently attempted service by mail, not upon HCCBC's registered agent for service of process, CT Corporation System, but rather pursuant to an envelope merely addressed "Ccca-Cola Bottling Company" sent, not to any

authorized agent of HCCBC, but rather to one its production facilities. In fact, Plaintiffs' Complaint does not even support its jurisdictional statement as to HCCBC, leaving blanks in reference to HCCBC's residence and authorized agent for service of process. See Exhibit C, p. 2 (Plaintiffs' Complaint). Additionally, Plaintiffs' Complaint seeks remedies clearly unavailable under the ADEA. Exhibit C, p. 3.

On January 12, 1990, 120 days passed from the filing of Plaintiffs' Complaint. As of the date of this Motion, Plaintiffs have not effected service upon HCCBC.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The service of process attempted by Plaintiffs was insufficient pursuant to Federal Rule of Civil Procedure 12(b)(c).

Plaintiffs' half-hearted, and to the

best of HCCBC's knowledge, only attempt to serve HCCBC within the 120 day period mandated by Rule 4(j) of the Federal Rules of Civil Procedure is insufficient under the Federal Rules of Civil Procedure.

Plaintiffs did not attempt to serve HCCBC in a prompt fashion, evidenced by the fact that no record exists of a summons issued upon filing of the Complaint. See Exhibit D (documentation delivered by this Court to HCCBC pursuant to HCCBC's efforts to obtain information about this Complaint). Plaintiffs did not attempt to utilize HCCBC's registered agent for service of process, or even attempt service on any authorized individual of HCCBC. The only known attempt at service is that of an envelope designated "Coca Cola Bottling Company" delivered to one of HCCBC's plant facilities, and only fortuitously and

belatedly brought to the attention of appropriate HCCBC representatives.

In a case with facts virtually on "all-fours" with the facts in this case, the Fifth Circuit has held that dismissal is appropriate. In Delta Steamships Lines, Inc. v. Albano, 768 F.2d 728 (5th Cir. 1985), plaintiff contended that the single certified mailing to a defendant, via restricted delivery, return receipt requested, "was the effective equivalent of the service-by-mail detailed in Fed. R. Civ. P. 4(c)(2)(C)(ii), "despite the fact that no acknowledgement was received from the defendant. Albano at 729. The Fifth Circuit examined this contention and rejected it, affirming the Southern District of Texas' prior dismissal based upon sufficiency of service of process, and concluding that:

> Rule 4(c)(2)(C)(ii) is an integrated procedure for establishing and proving in personam jurisdiction as well as service of process and that the defendant's return and acknowledgement are an essential part of that procedure. It necessarily follows that the requirements of Rule 4(c)(2)(C)(ii) must be fully satisfied if the benefits of the Rule are claimed.

Albano at 730.

Plaintiffs' failure to service HCCBC in a manner designated to give timely notice of this suit, i.e. by the simple process of looking up its registered agent, or even taking additional steps after the lack of response by HCCBC, is illustrative of the half-hearted attempts in effecting proper service disapproved by the Fifth Circuit.

"Only careful compliance with 4(c)(2)(C)(ii) will suffice." Id.

Plaintiffs were put on notice that service by mail was ineffective when they did not receive an acknowledgement of service. Apparently, Plaintiffs were content to let over 120 days elapse without further attempt to ensure that an authorized agent of HCCBC was given notice of the complaint. Thus, the reasoning of the Fifth Circuit in the factually parallel case of Albano is equally applicable to this action:

> The service of process attempted by [plaintiff] accords with neither state nor federal service requirements. The service on [defendant] was insufficient.

Albano at 730.

Thus, based on the facts of this case and the authority established in Albano,

Plaintiffs' action should be dismissed.

B. Plaintiffs' failure to effect service upon HCCBC within 120 days of the filing of their Complaint mandates dismissal of this action pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.

Rule 4(j) of the Federal Rules of Civil Procedure ("F.R.C.P.") imposes an affirmative duty upon a plaintiff to effect service of his or her summons and complaint upon a defendant within 120 days after the filing of the complaint. A failure to do so mandates dismissal of that complaint. Specifically, Rule 4(j) provides that:

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service

> was required cannot show good cause why such service was not made within that period, the action will be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion . . ."

F.R.C.P. 4(j).

Further, the Fifth Circuit has interpreted Rule 4 such that attempted service by mail does not satisfy the federal requirements. Rather, should such service be deficient, regarding either the form of service or due to the fact that receipt was never acknowledged, a plaintiff must take additional steps to ensure proper service. As stated by the Fifth Circuit,

> A plaintiff may attempt the inexpensive method of using the mail. If the plaintiff does not effect service in this way, service

must be made in some other fashion. Humana, Inc. v. Avram A. Jacobson, M.D., P.A., 804 F.2d 1390, 1393 (5th Cir. 1986) [emphasis added].

Additionally, the plain language of Rule 4(c)(2)(C)(ii) requires a plaintiff to take a "second step" to effect service, should no acknowledgement be received pursuant to attempted service by mail.

> If no acknowledgement of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

F.R.C.P. Rule 4(c)(2)(C)(ii).

The clear language of the Rule, supported by the Fifth Circuit decision,

and the total failure by plaintiffs to ensure that HCCBC was properly served within 120 days of the filed Complaint, mandates dismissal of this action pursuant to Rule 4(j).

C. Absent a showing of good cause for failure to properly effect service, Plaintiffs' Complaint must be dismissed.

The good cause exception to Rule 4(j)'s 120 day service period is strictly construed by the courts. See generally, Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3rd Cir. 1987) (legislative history's example of good cause references only a defendant who intentionally evades service); Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (5th Cir. 1985) (good cause standard of Rule 4(j) stricter than excusable neglect standard of Rule 6(b)(2)).

A failure to properly serve a defendant, within the 120 day period, based on no more than a plaintiffs' lack of reasonable diligence in taking steps to ensure proper service, justifies dismissal of the case. See, e.g., Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (5th Cir. 1985) (mere neglect, inadvertence or ignorance of rules in failing to properly effect service does not establish good cause); U.S. for Use and Benefit of DeLoss v. Kenner General Contractors, Inc., 764 F.2d 707 (9th Cir. 1985) (plaintiffs' half-hearted efforts to effect service prior to 120 day deadline merits dismissal of case); Quann v. Whitegate-Edgewater, 112 F.R.D. 649, 661 (D. Md. 1986) (party's lack of diligence in requesting an extension of time to effect service may indicate lack of good cause).

HCCBC has not attempted to avoid proper

service. A minimal attempt by Plaintiffs to ascertain HCCBC's registered agent for service of process would have effected prompt and proper service upon it in a timely fashion.

Further, HCCBC is not aware of any subsequent "second step" taken by Plaintiffs to properly serve HCCBC, as required by Federal Rule 4(c)(2)(C)(ii), upon a defendant's lack of response to attempted service by mail. See generally, Humana and Albano, supra.

Finally, HCCBC is unaware of any request by Plaintiffs for a Rule 6(b) enlargement of time within which to properly effect service upon HCCBC. See e.g., Reed Holdings Inc. v. O.P.C. Corp., 122 F.R.D. 441 (S.D.N.Y. 1988) (dismissal proper when plaintiff didn't seek Rule 6(b) relief and service wasn't again attempted until after 120 day period); Quann, supra (once counsel

is aware of service problem, no reason why service couldn't be made within time period).

Plaintiffs' failure to exercise even minimal diligence to effect proper service initially, or to take any additional measures to ensure proper service once put on notice that service by mail was ineffective, establishes a lack of good cause, and merits dismissal of this action.

D. The pecuniary damages requested in Paragraph 5 of Plaintiffs' prayer for relief are not available under the ADEA, and must be stricken from the Complaint.

Paragraph 5 of Plaintiffs' prayer for relief asks this Court to "Order Defendant to pay Plaintiffs pecuniary damages in the sum of $250,000.00 each . . ." This remedy is requested in addition to Plaintiffs' prayer for awards of reinstatement, back

pay, costs, and for equitable relief in the form of an injunction and a declaratory judgment. Exhibit C, p. 3.

While Plaintiffs' characterized the requested damages as "pecuniary," it is obvious that this term is merely a euphemism for additional monetary damages not recoverable under the ADEA. Plaintiffs have exhausted the remedies available pursuant to the ADEA, with the exception of liquidated damages neither alleged nor prayed for, in this action. See Dean v. American Security Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977), cert. denied, 434 U.S. 1066, 98 S.Ct. (1978) (Remedies available under the ADEA encompass "prompt reinstatement, promotion or other equitable relief coupled with lost wages, and liquidated damages, if appropriate . . .")

Plaintiffs' prayer for additional "pecuniary" damages, in excess of those

remedies provided by the ADEA, can only be categorized as an additional request for punitive damages or emotional distress damages, in the form of pain and suffering. In this regard, the Fifth Circuit has unequivocally held that general damages for pain and suffering, and punitive damages are not available remedies under the ADEA:

> We are in accord with the result reached in Rogers v. Exxon Research & Engineering Co.. . . . in rejecting a claim for damages for pain and suffering in a private action brought under the ADEA.
>
> . . .
>
> [Plaintiff's] claim for punitive damages fares no better [than] his claim for general damages . . .

Dean at 1038-39. Accord Cavanaugh v. Texas Instruments, Inc., 440 F. Supp. 1124, 1128 (S.D. Tex. 1977). Accordingly, Plaintiffs'

claim for pecuniary damages in Paragraph 5 of the prayer for relief must be stricken from the Complaint.

III. CONCLUSION

Based upon these facts set forth above and the controlling case law, Houston Coca-Cola Bottling Company, Inc. respectfully requests that Plaintiffs' Complaint be dismissed pursuant to Rules 12(b)(5) and 4(j) of the Federal Rules of Civil Procedure, or that the pecuniary damages requested in Paragraph 5 of Plaintiffs' prayer for relief be stricken from Plaintiffs' Complaint in a partial judgment on the pleadings.

This 15th day of January, 1990.

JENKENS & GILCHRIST

By:/s/
Thomas Hunt

1100 Louisiana
Suite 900
Houston, Texas 77002

Attorneys for Defendant Houston Coca-Cola Bottling Company, Inc.

OF COUNSEL:

Philip A. Bradley
Cathy L. Peterson

LONG, ALDRIDGE & NORMAN
Two Concourse Parkway
Suite 750
Atlanta, GA 30328-5347
(404) 527-8300

# # # # # # #

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| HARRY S. THERIOT and RAUL TREVINO Plaintiffs, | § | |
| vs. | § | CIVIL ACTION NO. H-89-3171 |
| HOUSTON COCA-COLA BOTTLING COMPANY, INC., Defendant. | § | |

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing

"DEFENDANT'S MOTION TO DISMISS COMPLAINT AND MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS and BRIEF IN SUPPORT" on counsel for Plaintiffs by depositing same in the United States mail, with adequate postage affixed thereto, and addressed to:

Robert Tilden Wallace
14507 Chasemont Dr.
Missouri City, TX 77489

This 15th day of January, 1990.

JENKENS & GILCHRIST

By: /s/
Thomas Hunt

1100 Louisiana
Suite 900
Houston, Texas 77002

OF COUNSEL:

Philip A. Bradley
Cathy L. Peterson

LONG, ALDRIDGE & NORMAN
Two Concourse Parkway
Suite 750
Atlanta, GA 30328-5347
(404) 527-8300

# # # # # # #

FEDERAL STATUTES:
28 U.S.C. 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. 1343:

Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any

person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of

citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. 2201:

Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal

Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

28 U.S.C. 2401:

Time for commencing action against

United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

29 U.S.C. 255:

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended. [citations omitted]

> (a) if the cause of action accrues on or after May 14, 1947 - may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . .

Relevant Federal Rules of Civil Procedure

Rule 4(j):

**Summons: Time Limit for Service.** If a

service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Rule 15(c): (1991 Amendment)

**Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when

(1) relations back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in

the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to

the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into action as a defendant.

# # # # # # #

No. 93-277

(2)

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1993

HARRY S. THERIOT and RAUL TREVINO,

*Petitioners,*

*vs.*

GREAT WESTERN COCA-COLA BOTTLING COMPANY d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

RONALD G. INGHAM
*Counsel of Record*
CHRISTOPHER H. STEGER
MILLER & MARTIN
*Attorneys for Respondent*
1000 Volunteer Building
832 Georgia Avenue
Chattanooga, Tennessee 37402
(615) 756-6600

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

I. Under Rule 15(c) of the Federal Rules of Civil Procedure governing amended pleadings, does a suit filed against a defendant, after the statute of limitations has run, relate back to an earlier suit against a different defendant which was dismissed for failure to effect service, where no amendment was filed?

II. Does an alleged, unsubstantiated misrepresentation made by the EEOC regarding the limitations period for filing a lawsuit under the ADEA merit the application of the doctrine of equitable tolling to preserve the cause of action, where the law is clear as to the applicable statute of limitations and Petitioners were at all times represented by counsel?

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No. 93-277

In The

# Supreme Court of the United States

October Term, 1993

HARRY S. THERIOT and RAUL TREVINO,

*Petitioners,*

*vs.*

GREAT WESTERN COCA-COLA BOTTLING COMPANY d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

The Petitioners, Harry S. Theriot and Raul Trevino, filed a complaint against Great Western Coca-Cola Bottling Company, d/b/a Coca-Cola Bottling Company of Houston,[1] in the United

1. There are no parent companies or subsidiaries of Great Western Coca-Cola Bottling Company, because the entity no longer exists. Prior to its merger into Coca-Cola Enterprises Inc., Great Western Coca-Cola Bottling Company was a subsidiary of Coca-Cola Enterprises Inc. and Denver Coca-Cola Bottling Company.

States District Court for the Southern District of Texas, Houston Division, on February 18, 1992. The complaint is based solely on the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The complaint recites that they were discharged by Coca-Cola on September 14, 1987. Consequently, any cause of action under the ADEA that the Petitioners may have had arose on or before September 14, 1987, some 4 years and 5 months before the complaint was filed.

Prior to the filing of the above referenced lawsuit, Petitioners filed a complaint (hereinafter referred to as the "first complaint") captioned *Harry S. Theriot and Raul Trevino v. Houston Coca-Cola Bottling Company,* Civil Action No. H-89-3171, in the United States District Court for the Southern District of Texas, Houston Division, on September 14, 1989, exactly two years after Petitioners' discharge from Respondent's employ. The complaint was based solely on the ADEA.

By order dated January 18, 1990, the first complaint was dismissed pursuant to Rule 4(j) of the Federal Rules of Civil Procedure, for failure to effect service of process within one hundred twenty (120) days of filing of the complaint. Petitioners did not seek to reinstate the complaint, nor did they assert an inability to locate Respondent's registered agent or any other reason for having failed to obtain service of process.

Petitioners filed a second complaint (hereinafter referred to as the "second complaint") on August 21, 1991, captioned *Harry S. Theriot and Raul Trevino v. Coca-Cola Enterprises Inc.,* Civil Action No. H-91-2463, in the United States District Court for the Southern District of Texas, Houston Division. The complaint was based solely on the ADEA. This second complaint was a completely new action, with a civil action number and caption different than that of the preceding complaint. It was not an amendment to the first complaint.

By order dated December 30, 1991, Petitioners' second complaint was also dismissed under Rule 4(j), on the basis that service of process had not been obtained within one hundred twenty (120) days of the filing of the complaint. Petitioners did not move to reinstate their second complaint, nor did they assert that they had been unable to find Respondent's registered agent.

Petitioners' third lawsuit, referenced above and filed February 18, 1992, is the basis of their present petition to the Court. This complaint (hereinafter referred to as the "third complaint") was filed four years and five months after their employment with Respondent was terminated (September 14, 1987). Claims filed under the ADEA must be filed within two years of accrual, unless the alleged violation is a willful one, in which case the complaint must be filed within three years. 29 U.S.C. § 626(e)(1); 29 U.S.C. § 255.

Respondent filed a motion to dismiss the third complaint and a supporting brief on March 17, 1992, on the basis that Petitioners' age discrimination claim was barred by the ADEA's two or three year statute of limitations. Petitioners filed a motion in opposition on April 8, 1992.

By final order of dismissal dated April 9, 1992, accompanied by a memorandum opinion, the District Court dismissed Petitioners' third complaint on the basis that the lawsuit was barred by the statute of limitations applicable to causes under the ADEA.

Petitioners filed a motion to reinstate on April 17, 1992, along with a copy of Petitioners' motion in opposition to Respondent's motion to dismiss, which Petitioners had previously filed on April 8, 1992. Respondent filed its response to the motion along with a supporting memorandum on May 7, 1992. The court denied Petitioners' motion to reinstate on May 27, 1992, again ruling that suit under the ADEA was barred by the applicable statute of limitations.

Petitioners filed a notice of appeal in April, 1992, and again on June 19, 1992. The United States Court of Appeals for the Fifth Circuit, by decision dated February 3, 1993, affirmed the dismissal of the complaint on the basis that it was barred by the statute of limitations. Petitioners' petition for rehearing was denied by order dated March 8, 1993.

Respondent filed a motion for sanctions with supporting memorandum of law and affidavit of Respondent's attorney on February 15, 1993, on the grounds that the Petitioners' appeal to the Fifth Circuit was frivolous, because its disposition was obvious given its complete lack of merit. Petitioners opposed the motion and filed a response. The motion was denied by order dated March 17, 1993.

The present petition for writ of certiorari was filed on June 7, 1993 (having been originally refused for failure to comply with the Rules of the Supreme Court and a corrected petition refiled on August 17, 1993).

## SUMMARY OF ARGUMENT

Petitioners' employment with the Respondent, Great Western Coca-Cola Bottling Company, d/b/a Coca-Cola Bottling Company of Houston, was terminated on September 14, 1987. Petitioners filed a complaint in the United States District Court for the Southern District of Texas, Houston Division. The complaint was based upon the Age Discrimination in Employment Act ("ADEA"), and was filed on September 14, 1989, exactly two years from the date of their discharge. The complaint was properly dismissed under Rule 4(j) of the Federal Rules of Civil Procedure, for failure to obtain service of process within one hundred twenty (120) days of the filing of the complaint.

Petitioners did not move to reinstate the complaint. Instead,

they allowed some twenty (20) months to pass, and then filed a second complaint on August 29, 1991, again in the United States District Court for the Southern District of Texas, Houston Division, asserting a cause of action under the ADEA. This second complaint was not an amendment to the first complaint, and was given a different civil action number. Like the first complaint, the second complaint was properly dismissed pursuant to Rule 4(j) for failure to obtain service of process within one hundred twenty (120) days of the filing of the complaint. Again, Petitioners did not move to reinstate the action.

On February 18, 1992, Petitioners filed a third complaint alleging age discrimination under the ADEA. Approximately four years and five months had passed since their termination. The complaint did not in any way assert that it was an amendment to prior pleadings. Upon a motion of Respondent, the case was dismissed with prejudice on the basis that it had been filed outside of the two or three year statute of limitations for actions under the Age Discrimination in Employment Act.

Petitioners rely upon the relation back doctrine embodied in Rule 15(c) of the Federal Rules of Civil Procedure. Their reliance is misplaced. There is no evidence in the record before this Court which would suggest that the complaint filed on February 18, 1992, should relate back to the first complaint filed on September 14, 1989. Rule 15(c) speaks specifically to amendment of pleadings, and does not provide for relation back of subsequently-filed lawsuits. There are no facts in the record to support Petitioners' allegation that Respondent deliberately evaded service of process or disguised its true identity from the Petitioners. Nor have the Petitioners ever produced competent evidence of their unsuccessful attempts to discover Respondent's registered agent. Their assertion to this effect, coming only after the dismissal of their third complaint, is not worthy of consideration. Petitioners did not assert this argument until long after the time necessary to preserve it had passed.

Petitioners' failure to obtain service of process on Respondent after the filing of their complaints in September of 1989, and again in August of 1991, was purely a result of the Petitioners' own neglect. Therefore, the complaint filed February 18, 1992 should not relate back to the filing of the first or second complaint.

Petitioners' argument that the two or three-year statute of limitations applicable under the ADEA should have been tolled because of some representation made to them by an unspecified agent of the EEOC is unsupported by any evidence before this Court. Petitioners' first complaint filed under the ADEA recited on its face that suit was being filed within the two year limitations period. Approximately twenty (20) months later, Petitioners filed a second complaint, this time asserting that it was being filed within the five-year limitations period. Petitioners' assertion (made for the first time in their brief on appeal to the United States Court of Appeals for the Fifth Circuit) that they delayed in filing their lawsuit because of some representation made to them by an agent of the EEOC, is contradicted by the pleadings themselves. Additionally, at all times relevant hereto, the Petitioners had assistance of counsel. The claims of the Petitioners in their third complaint against the Respondent are clearly time-barred, and were properly dismissed with prejudice.

## REASONS FOR DENYING THE WRIT

### I.

### THE FIFTH CIRCUIT PROPERLY REJECTED PETITIONERS' ARGUMENT FOR RELATION BACK OF THEIR COMPLAINT TO AN EARLIER, SEPARATE LAWSUIT.

Petitioners argue that Federal Rule of Civil Procedure 15(c) should be applied here to allow their suit to go forward. Rule 15(c)

begins with the statement that "[a]n amendment of a pleading relates back to the date of the original pleading when . . .," and then proceeds to list the situations in which relation back applies. The Petitioners never attempted to amend either their first or second complaint. Instead, they simply filed a completely separate lawsuit each time, naming a different defendant. In fact, the title of each subsequent complaint was entitled "*Original Complaint*," and made no reference to any earlier filed complaint.

Rule 15(c), by its very terms, applies only to amended pleadings. There is no authority which would extend the rule to subsequently-filed, separate lawsuits, or to situations in which no amendment has been filed. To the contrary, in a recent Sixth Circuit case, it was held that, where the plaintiffs neither sought to amend their complaint nor to alter or amend judgment, but filed a completely separate suit against a party not previously named only seven (7) days after the dismissal of the original complaint, Rule 15(c) would not be extended to correct the plaintiffs' mistake. *State Bank of Coloma v. National Flood Insurance Program*, 851 F.2d 817 (6th Cir. 1988). Additionally, in refusing to apply principles of equitable tolling based upon the actual knowledge of the proper defendants, the court held that:

> Where the Federal Rules of Civil Procedure provide the means to remedy a mistake, as they do here, equity does not require the court to provide an additional procedure.

*Id.* at 821; *see also, Worthams v. Atlanta Life Ins. Co.*, 533 F.2d 994 (6th Cir. 1976) (the word "amended" was stricken and a new civil action number assigned; therefore the complaint comprised a new action, not an amended complaint, and was barred by the statute of limitations).

In the present case, the passage of approximately twenty (20)

months between the filing of the second complaint and the filing of the first, and the fact that no motion to alter or amend judgment or to file an amended complaint was submitted, clearly moves this case beyond the mere "technical grounds of pleading" which rules such as Rule 15(c) were meant to address. Also noteworthy is that, from the time a responsive pleading has been served, a party must seek leave of court to amend a pleading, or attain consent of the adverse party. Fed. R. Civ. P. 15(a). At no time did Petitioners do so. Each time Petitioners' action was dismissed, they filed a completely new action. There is simply no "amended pleading" to relate back to the earlier complaints, and Petitioners have offered no authority to support their argument of relation back. Rather, Petitioners merely state that their complaints "should be considered as amendments and should relate back to their first Original Complaint." (Petition for Writ of Certiorari, p. 11).

The cases cited by Petitioners to support their relation back argument do not, in fact, support their position. The standard set forth in *Schiavone v. Fortune,* 477 U.S. 21 (1986), is indeed the appropriate standard to apply when relation back is at issue, even as the standard exists since the 1991 amendment of Rule 15(c). However, while *Schiavone* provides the standard for relation back under Rule 15(c), it specifically deals with an *amended complaint.* The case under consideration does not involve an amended complaint; rather, it involves three separate original complaints. For that reason, *Schiavone* is not applicable. Similarly, the Fifth Circuit's unpublished decision in *Dacus v. United States Postal Service,* No. 87-6067 (5th Cir. 1988) (LEXIS Genfed Library, USApp. file), and its decisions in *Bell v. Veterans Admin. Hosp.,* 826 F.2d 357, 359 (5th Cir. 1987), and *Gonzalez v. Secretary of Air Force,* 824 F.2d 392, 395-96 (5th Cir. 1987), all of which are cited in the petition for writ of certiorari, are inapposite. These cases deal with amended pleadings, while the present case does not.

In further support of their relation back arguments, Petitioners

assert that the Respondent somehow made it difficult for Petitioners to determine the appropriate registered agent for service of process through the Secretary of State. This argument is flawed on many levels, most notably that: (1) there is no evidence in the record to substantiate any such allegation; (2) Petitioners raised this argument for the first time only after their third complaint had been dismissed, and; (3) the argument mistakenly assumes that a corporate entity may only be served through its registered agent.

Rule 10 of the Federal Rules of Appellate Procedure provides in pertinent part:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

Petitioners were required to produce affidavits or other competent evidence regarding their efforts to effect service in order to avoid dismissal under Rule 4(j). *Cf., In re City of Philadelphia Litigation*, 123 F.R.D. 512 (D. Pa. 1988); *Shaw v. Rolex Watch U.S.A., Inc.*, 745 F. Supp. 982 (D. N.Y. 1990). Petitioners never offered any competent evidence, in the form of supporting affidavits or any other form, to either the District Court or the Fifth Circuit Court of Appeals. It follows that they cannot now assert these matters without evidentiary support in the record. The unsubstantiated assertions of Petitioners' counsel should not be given consideration.

Furthermore, Petitioners' argument was not timely raised. Petitioners waited until April, 1992 (Plaintiff's Motion in Opposition to Defendant's Motion to Dismiss) to complain that

they could not effect service because they could not locate Respondent's registered agent. Petitioners certainly had the opportunity to raise that argument on at least two occasions prior to the third dismissal, and yet failed to do so.

The burden to show why dismissal should not be granted in a given case rests solely with the plaintiff:

> If a service of the summons and complaint is not made upon a Defendant within one hundred and twenty days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that Defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed. R. Civ. P. 4(j). If Petitioners' counsel ever genuinely believed that there was good cause for the failure of service, such as hardship in locating the appropriate party to accept service, then counsel should have raised that issue at the time that the first and second complaints were dismissed. As the District Court below noted in denying Petitioners' Motion to Reinstate the third complaint:

> [Plaintiffs'] allegation that they were unable to effect service on [defendant] because they could not identify a registered agent lacks credulity. Initially, the Court notes that the assertion was not raised in the two prior cases to explain the failure to effect service and to avoid dismissal or seek reinstatement. Additionally, [plaintiffs] have submitted no

> documentation indicating that they attempted unsuccessfully to locate a registered agent.

Likewise, arguments such as those alleging actual notice of or receipt of service by Respondent, and of service on an alleged "alter ego" corporation, both asserted by Petitioners in the Petition for writ of certiorari, were not timely raised below and therefore should not now be considered.

The Rules specifically provide a plaintiff a means and opportunity to object to dismissal and to show good cause for failure of service. *See* Fed. R. Civ. P. 4(j). Petitioners failed to utilize this remedy. As noted above, where the Rules provide a remedy, the court is not required to provide the non-diligent party with an additional procedure. *State Bank of Coloma*, 851 F.2d at 820, 821. Furthermore, Petitioners never filed a Rule 6(b) motion for an extension of time for service, a fact "which has been noted by other courts as at least some evidence of lack of diligence," *Quann v. Whitegate-Edgewater*, 112 F.R.D. 649, 661 (D. Md. 1986) (citations omitted), and thus as justifying dismissal.

Another flaw in Petitioners' argument is that it is premised on the mistaken notion that Respondent could only be served with process through a "registered agent." To the contrary, Rule 4(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (3) Upon a domestic or foreign corporation . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized

> by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Respondent had a facility in Houston. It would have been a simple matter for the Petitioners to have accomplished service of process on "an officer, a managing or general agent." Assuming, *arguendo*, that the Petitioners did have trouble finding a "registered agent" for service of process, they should have attempted service on another designated representative. There is nothing in the record before this Court which would suggest that they attempted to do so.

Beyond these obvious fallacies in Petitioners' arguments, they have offered no reasonable explanation as to why they waited some twenty (20) months between the dismissal of their original lawsuit on January 18, 1990, and the filing of their second lawsuit on August 29, 1991. That delay of over one and a half years evidences the fact that the Petitioners were not having trouble obtaining service of process; rather, they were making no effort to do so. "One who fails to act diligently cannot evoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).

Based upon the foregoing, the Fifth Circuit properly concluded that Petitioners' complaint filed in February of 1992 should not relate back to the complaint filed in August of 1989.

## II.

## THE FIFTH CIRCUIT PROPERLY REJECTED PETITIONERS' ARGUMENT FOR EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS.

The Petitioners' lawsuit was initiated by a complaint which was filed on February 18, 1992. The complaint is based solely upon the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.* More specifically, the Petitioners have alleged that they were discharged on September 14, 1987, for no reason other than their age. Based upon the allegations in their complaint, a period of approximately four years and five months elapsed between the Petitioners' termination and the filing of their lawsuit on February 18, 1992.

29 U.S.C. § 626(e)(1) governs the statute of limitations in cases filed under the ADEA. It provides in pertinent part:

> Sections 255 and 259 of this title shall apply to actions under this chapter.

Consequently, the drafters of the ADEA relied upon the statute of limitations already set forth in 29 U.S.C. § 255. This statute provides in pertinent part:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [citations omitted] . . .
>
> (a) if the cause of action accrues on or after May 14, 1947 — may be commenced within

> two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . .

Thus, the applicable statute provides that a lawsuit brought under the ADEA must be commenced within two years after the employee is terminated, or within three years in the event that a willful violation has occurred. When the Petitioners filed their lawsuit four years and five months after they had been terminated, the statute of limitations had already expired.

In an effort to circumvent this problem, Petitioners have raised the argument that the statute of limitations should be tolled because some unidentified agent of the Equal Employment Opportunity Commission advised them that they were not subject to the two or three year statute of limitations; rather, they "were subject to the six-year statute of limitations that was allowed for federal employees . . . and the catch-all statute of limitations for non-tort civil claims against the United States Government . . ." (Petition for Writ of Certiorari, pp. 24-25). Petitioners' counsel never asserted this argument at the trial court level, either in the Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss the third complaint, or in their Motion to Reinstate the same complaint. The argument was raised for the first time in their memorandum in support of their appeal to the Fifth Circuit. In any event, Petitioners' delinquent argument should not be considered because there is absolutely no evidence in the record to support the naked assertion that an agent of the EEOC somehow misled them, beyond the affidavit of Petitioner Harry S. Theriot, filed only in response to Respondent's motion for sanctions on March 3, 1993, and well after the Fifth Circuit had heard and ruled on Petitioners'

arguments in reviewing the dismissal. Beyond that, this new-found assertion appears to be inconsistent with the record itself.

When the lawsuit was originally filed on September 14, 1989, on the last day of the two year statute of limitations, Petitioners were represented by their present attorney, Robert Wallace. Consequently, it would seem that any representations made by the EEOC would not have been to an uninformed layman, but rather to an attorney charged with the responsibility of knowing the law. In addition, in the first complaint the Petitioners alleged:

> The discriminatory acts of the Defendant occurred on the 14th day of September, 1987. On the 9th day of June, 1989, Plaintiffs received their notice of determination on review from the EEO Commission, and on this 14th day of September, 1989, *suit is filed in the Federal District Court within the two years [sic] limitation period.*

(Emphasis added). Consequently, Petitioners' counsel was aware of the two year statute of limitations as of September 14, 1989, when he originally filed a lawsuit. Because Petitioners were aware of their right to assert their ADEA claims in court, and were represented by an attorney throughout their dealings with the EEOC, they are "charged with knowledge of the law's requirement that any suit under the ADEA had to be brought within two [or three] years" of the date of the accrual of the action. *See Vesey v. Vitro Corp.*, 55 F.E.P. Cases 1100, 1103 (D.C. Md. 1990) (doctrine of equitable tolling would not save a claim from the ADEA's statute of limitations, where plaintiff claimed to have relied on erroneous advice from the EEOC); *Bell v. Veterans Admin. Hosp.*, 826 F.2d 257 (5th Cir. 1987) (rejecting a *pro se* plaintiff's argument that technical filing requirements should be waived because he was misled by the court; disallowing amendment to name proper defendant).

Petitioners' reliance upon *Johnson v. U.S. Postal Service*, 861 F.2d 1475 (10th Cir. 1988) is misplaced. In that case, a plaintiff proceeding *in forma pauperis* was denied the benefit of equitable tolling because he was not actively misled or lulled into inaction. *Johnson* does not support a liberal application of equitable tolling on these grounds. Rather, *Johnson* stands for the proposition that the doctrine should be strictly applied. Its reference to cases allowing equitable tolling stresses the absence of counsel, or involves a misrepresentation on an issue upon which the court or agency had a particular obligation to the plaintiff. In the present case, any alleged misrepresentation by the EEOC did not cause Petitioners' time to expire; rather, it was the fact that they waited until the very last day of the limitations period to file suit and then failed to effect service as required.

After the Petitioners' first complaint was dismissed for failure to prosecute, a second complaint was filed on August 29, 1991. Petitioners' counsel alleged in the second complaint that "suit is being filed in the Federal District Court within the five year limitation period provided under 29 U.S.C. Sec. 621." Petitioners' counsel again referenced a five year limitations period in the third complaint, which he filed on February 18, 1992. If at some point Petitioners' counsel was under the misunderstanding, based upon a representation from some unknown agent of the EEOC, that the claim was subject to a six year statute of limitations, then this impression never reflected itself in any of the pleadings which he filed. In those pleadings, Petitioners referenced a five year limitation period, and cited 29 U.S.C. § 621, as the basis for that assertion.

Petitioners' argument for equitable tolling of the statute of limitations is not credible. First, there is no authority to support the argument that the statute of limitations allowed for federal employees or for non-tort claims against the government should be applied to private employers. More important, however, is the fact

that, as of the date of filing the first complaint and at all times subsequent, Petitioners were represented by an attorney who knew or should have known that the ADEA provided a two or three year statute of limitations. Even assuming, *arguendo,* that Petitioners themselves may have "rightfully and reasonably" believed the alleged misrepresentations of the EEOC, their counsel is charged with the duty to know better, especially in the face of unambiguous law and precedent on the point. After all, the time for EEOC involvement had long passed.

The Fifth Circuit properly upheld the District Court's dismissal of Petitioners' claims on the basis that they were time-barred. The Petitioners' contentions regarding equitable tolling are without merit.

## CONCLUSION

The Fifth Circuit properly upheld the District Court's dismissal with prejudice of the Petitioners' complaint filed on February 18, 1992, on the basis that their claims were barred by the applicable statute of limitations. There is neither authority nor support in the record before this Court to suggest that the complaint filed in February, 1992, should relate back to some earlier-filed complaint which was dismissed for failure to obtain service of process. Beyond that, there is no evidence before this Court, nor is there any reason that the statute of limitations applicable to ADEA claims should be equitably tolled.

Based upon the foregoing, Respondent respectfully requests this Court to deny the Petitioners' petition for writ of certiorari and dismiss this action.

Respectfully submitted,

RONALD G. INGHAM
*Counsel of Record*
CHRISTOPHER H. STEGER
MILLER & MARTIN
*Attorneys for Respondent*
1000 Volunteer Building
832 Georgia Avenue
Chattanooga, Tennessee 37402
(615) 756-6600